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Lauren Attard

*Society for Disability Studies*

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# A Price on Volunteerism: The Public Has a Higher Duty to Accommodate Volunteers

## **Cover Page Footnote**

\* Presented at the Society for Disability Studies Annual Meeting, 2006, as part of a panel entitled “Re-Imagining Disability Law: Prospects, Perils and Possibilities.” \*\* J.D., 2007, Fordham University School of Law. I am grateful to Professor Ravi Malhotra at the University of Ottawa, Evan Brustein, founder of [beyondtheramp.com](http://beyondtheramp.com), Leslie Gold, Jordan Schwartz, and Rosa D’Abate.

## **A PRICE ON VOLUNTEERISM: THE PUBLIC HAS A HIGHER DUTY TO ACCOMMODATE VOLUNTEERS\***

*Lauren Attard\*\**

[N]o matter how big and powerful government gets and the many services it provides, it can never take the place of volunteers.

— *Ronald Reagan*<sup>1</sup>

A volunteer is a person who can see what others cannot see, who can feel what most do not feel. Often, such gifted persons do not think of themselves as volunteers, but as citizens in the fullest sense, partners in civilization.

— *George H. Bush*<sup>2</sup>

Volunteers are essential to the proper functioning of America. Non-profit organizations normally do not have enough resources to retain the requisite number and quality of paid staff members.<sup>3</sup> More important than increasing the size of the workforce, however, are the special skills and interests that volunteers often bring to an organization. The personal attachment, perspective, and dedication that these volunteers offer are very distinct from the services of a typical employee.<sup>4</sup> Volunteers often have personal experience in the non-profit organization's cause and are successful in other aspects of their lives. In fact, business executives and ce-

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1. Ronald Reagan, Remarks at the 1985 President's Volunteer Action Awards Luncheon, Public Papers of the Presidents, Apr. 22, 1985, *available at* <http://www.reagan.utexas.edu/archives/speeches/1985/42285a.htm> (last visited Mar. 3, 2007).

2. Michelle McMahon, *Guest Column*, NEWARK ADVOC. (OHIO), Aug. 11, 2005, at 6A (quoting former President George H. Bush).

3. *See, e.g.*, Muscular Dystrophy Ass'n, National Events and Programs Volunteer Opportunities, <http://www.mdausa.org/help/natevents.html> (last visited Apr. 17, 2007).

4. *See, e.g.*, Jeffrey L. Brudney, *Volunteer Involvement in the Delivery of Public Services: Advantages and Disadvantages*, 16 PUB. PRODUCTIVITY & MGMT. REV. 283, 285 (1993) ("[Volunteers] may bring . . . specialized skills not possessed by employees (for example, legal, computer, or technical skills) that yield improvements in services or programs. . . . [They] may personalize and enhance the delivery of public services.").

lebrities often volunteer many hours in support of their favorite causes.<sup>5</sup>

Instead of paying their volunteers, organizations often compensate volunteers by providing them with benefits. The benefits can range from perks such as access to facilities to the “warm, fuzzy feeling” that comes from spending time working with the beneficiaries of the organization. Both parties normally see the relationship as an equal exchange of services: the volunteers provide their time and energy in exchange for access to the organization’s people and facilities.

One such organization that utilizes the services of volunteers is the Muscular Dystrophy Association (“MDA”). The MDA, funded only by private donations, provides research services, various forms of educational outreach, and community services including summer camps for children with muscular dystrophy.<sup>6</sup> Of the two million volunteers that help the MDA annually, the MDA’s famous chairman, comedian Jerry Lewis, is its “number-one volunteer.”<sup>7</sup>

Despite the vital position many volunteers occupy, the United States Court of Appeals for the Tenth Circuit decided that the Americans with Disabilities Act (“ADA”) does not protect these volunteers from discrimination. In *Bauer v. Muscular Dystrophy Ass’n*, the court ruled that an MDA summer camp is not required to accommodate volunteers with disabilities—even volunteers with muscular dystrophy.<sup>8</sup> According to the court, the MDA’s requirement that all volunteers, including administrative volunteers, have the ability to lift *and* care for a camper is not discriminatory.<sup>9</sup>

People with disabilities have been protected from discrimination since the enactment of the ADA in 1990.<sup>10</sup> The drafters of the ADA intended it to “provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disa-

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5. For example, Andre Agassi and Bill Gates both volunteer considerable amounts of time running their foundations. See Andre Agassi Charitable Foundation, Home Page, <http://www.agassifoundation.org> (last visited Apr. 17, 2007); Bill & Melinda Gates Foundation, About Us, <http://www.gatesfoundation.org/AboutUs> (last visited Apr. 17, 2007).

6. Muscular Dystrophy Ass’n, MDA Fact Sheet, <http://www.mdaua.org/publications/mdafacts.html> (last visited Apr. 17, 2007).

7. *Id.*

8. 427 F.3d 1326, 1333 (10th Cir. 2005).

9. See *infra* text accompanying note 56.

10. 42 U.S.C.A. §§ 12101-12213 (West 2007). Prior to the ADA, various other federal statutes helped to protect some rights of people with disabilities, such as Section 504 of the Rehabilitation Act. 29 U.S.C.A. §§ 701-99 (West 2007).

bilities.”<sup>11</sup> To achieve this goal, the ADA protects against, among other things, discrimination in places of public accommodation under Title III<sup>12</sup> and discrimination against employees under Title I.<sup>13</sup> Places of public accommodation include private entities such as “a place of recreation,” “a place of education,” and a “social service center establishment.”<sup>14</sup> Title III, for example, would protect a child with disabilities who attends a summer camp. Under Title I, a protected employee is defined as “an individual employed by an employer,” and an employer is a “person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks . . . and any agent of such person.”<sup>15</sup> Title I, therefore, would protect an employee working at a summer camp. The ADA, however, does not clearly address where volunteers fit into this structure, and this omission has led to the failure to accommodate volunteers as exemplified by the *Bauer* decision.

This Comment first examines the issues presented in *Bauer* and the court’s rationale for finding that volunteers are not protected under Title III. Part II explores the requirements and differences between Title I and Title III and provides some history of the definitions of “volunteer” and “employee.” Part III presents a public duty thesis arguing that the responsibility of providing accommodations should not belong solely to employers in the context of employees, or public accommodations in the context of patrons, but to all factions of society. This Comment concludes with an exploration in Part IV of the public duty thesis and how such a thesis may work under our current system.

## I. BACKGROUND AND EXPLANATION OF *BAUER*

There are a myriad of degrees and types of diseases characterized as muscular dystrophy.<sup>16</sup> Whereas some children with muscular dystrophy have severe physical and medical disabilities, some children and adults with muscular dystrophy exhibit very mild

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11. 42 U.S.C.A. § 12101(b)(2).

12. *Id.* § 12181(7)(I)-(L).

13. *Id.* § 12111.

14. *Id.* § 12181(7)(I)-(L).

15. *Id.* § 12111(4)-(5).

16. *See, e.g.*, Muscular Dystrophy Ass’n, Diseases, <http://www.mdausa.org/disease/> (last visited Apr. 17, 2007).

physical effects.<sup>17</sup> Camp Chihowa is an MDA camp for children and young adults with all degrees and types of muscular dystrophy.<sup>18</sup> Nevertheless, the camp's management told two former volunteers who have muscular dystrophy, Gina Bauer and Suzanne Stolz, that they could no longer provide their services at the camp.<sup>19</sup> The management decided to enforce its policy that volunteers meet physical requirements "necessary to fulfill the primary purpose of the camp and to ensure its safe operation."<sup>20</sup> The policy, which requires that all volunteers are "of sufficient size and strength to assist with the needs of campers" and are able to "lift and care for campers," has been in effect since at least 1993.<sup>21</sup>

Both Ms. Bauer and Ms. Stolz, who cannot "lift and care for a camper" because of the effects of muscular dystrophy, were volunteer counselors at Camp Chihowa for five years between 1995 and 2000.<sup>22</sup> Each volunteer devoted a substantial amount of time to the camp, both administratively and as a traditional counselor. Both Ms. Bauer and Ms. Stolz were volunteer co-directors of the camp's newspaper and yearbook in 2002.<sup>23</sup> Moreover, Ms. Bauer not only assisted a new camp director in major organization and planning of the camp in 2001, but in the previous year she served as a personal attendant to a camper.<sup>24</sup> The job of a personal attendant is very time intensive. Typically, the camp assigns one volunteer counselor to each camper as her personal attendant to accompany the child at all times.<sup>25</sup> Other volunteer counselors, in addition to performing their duties, fill in when the personal attendants are not available.<sup>26</sup> As the district court explained, in addition to performing as attend-

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17. See, e.g., Nat'l Inst. of Neurological Disorders and Stroke, NINDS Muscular Dystrophy Information Page, <http://www.ninds.nih.gov/disorders/md/md.htm> (last visited Apr. 17, 2007).

18. Camp Chihowa MDA Summer Camp Kansas City, <http://www.ibelievedesign.com/chihowa> (last visited Apr. 17, 2007).

19. *Bauer v. Muscular Dystrophy Ass'n (Bauer II)*, 427 F.3d 1327, 1328-29 (10th Cir. 2005).

20. *Id.* at 1329.

21. *Bauer v. Muscular Dystrophy Ass'n (Bauer I)*, 268 F. Supp. 2d 1281, 1284 (D. Kan. 2003) ("MDA has had such a policy at the national level for at least 12 years, although the Wichita staff who ran the camp in the past were apparently unaware of the policy.").

22. *Bauer II*, 427 F.3d at 1328.

23. *Id.*

24. *Bauer I*, 268 F. Supp. 2d at 1286.

25. *Id.*

26. *Id.*

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ants, these volunteers generally “form a strong bond with children at the camp . . . .”<sup>27</sup>

Meanwhile, in 2003, the MDA added a question to the volunteer application asking whether the applicant can lift and care for a camper. That same year the camp director informed Ms. Bauer that she could no longer volunteer because she did not meet these requirements.<sup>28</sup>

The district court opinion hints that the plaintiffs’ disabilities were not the only factor that motivated the director’s decision to deny them the chance to volunteer.<sup>29</sup> Specifically, the opinion explains that although the MDA typically aims for Camp Chihowa to have fifty volunteers to care for its forty campers, the camp had seventy volunteers in 2002.<sup>30</sup> A camp director objected to the camp’s large number of volunteers and was upset that volunteers did not have duties to occupy all of their time at the camp.<sup>31</sup> In particular, the director was disappointed that Ms. Stolz and Ms. Bauer’s positions as newspaper and yearbook editors only required them to work about two hours a day, providing enough free time to partake in such activities as swimming in the pool, which required the assistance of other volunteers.<sup>32</sup> The director was upset that the volunteers were enjoying the same benefits as campers, and even taking resources away from campers.<sup>33</sup>

The plaintiffs filed suit against the MDA, alleging that the MDA’s conduct violated both the Kansas Act Against Discrimination<sup>34</sup> and Title III of the ADA,<sup>35</sup> which governs places of public accommodation.<sup>36</sup> The district court rejected the plaintiffs’ contention that Title III governed their claim.<sup>37</sup> The court instead relied on a Senate Report which explained, “Title III is not intended to govern any terms or conditions of employment by providers of

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27. *Id.* at 1288. The court goes on to explain, “the camps are not operated for the purpose of providing benefits, privileges, or advantages to the volunteers.” *Id.*

28. *Bauer II*, 427 F.3d at 1328.

29. *Id.* at 1331.

30. *Id.*

31. *Bauer I*, 268 F. Supp. 2d at 1287.

32. *Id.*

33. *Id.* at 1288.

34. KAN. STAT. ANN. §§ 44-1001 to -1121 (West 2005).

35. 42 U.S.C.A. §§ 12131-34 (West 2007).

36. The case was filed in Kansas state court, but was removed to the United States District Court for the District of Kansas under the court’s federal question jurisdiction. *Bauer v. Muscular Dystrophy Ass’n*, 427 F.3d 1326, 1329 (10th Cir. 2005).

37. *Bauer I*, 268 F. Supp. 2d at 1293.

public accommodations or potential places of employment; employment practices are governed by [T]itle I of this legislation.”<sup>38</sup>

The district court remained unconvinced by the Third Circuit’s reasoning in *Menkowitz v. Pottstown Memorial Medical Center*, which allowed an independent contractor to assert a claim under Title III and not Title I, because he was not an employee.<sup>39</sup> The defendant in *Menkowitz* argued that use of the term “individuals” in a place of public accommodation referred to in Title III<sup>40</sup> only protects the “clients and customers” of a place of public accommodation and not, as the plaintiff argued, independent contractors.<sup>41</sup> The United States Court of Appeals for the Third Circuit looked to legislative history, congressional intent, and case law before commencing its analysis of the statute.<sup>42</sup> The court acknowledged that the terms “individuals” and “place of public accommodation” could be broadly construed,<sup>43</sup> but found the defendant’s argument that “individuals” only includes “clients and customers” too narrow.<sup>44</sup> “Clients and customers” is a term used in only a small subsection of Title III.<sup>45</sup> In fact, that particular subparagraph in Title III states that the definition of “individuals” as “clients and customers” is only “[f]or purposes of clauses (i) through (iii) of this subparagraph . . . .”<sup>46</sup> In other words, the drafters declined to extend this definition to the whole of Title III.

The *Menkowitz* court also noted that the plaintiff would have no recourse under the ADA if he was not covered by Title III.<sup>47</sup> The court found it unlikely that Congress intended to leave out the class of independent contractors, given the broad nature and scope of the ADA.<sup>48</sup>

Despite the Third Circuit’s careful and thorough explanation of its rationale for supporting the plaintiff’s claim, the district court in *Bauer* agreed with the defendant’s position in *Menkowitz*. It found that “public accommodation laws are designed to protect custom-

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38. S. REP. NO. 101-116, at 58 (1989).

39. 154 F.3d 113, 122 (3d Cir. 1998). “[Title I] does not protect independent contractors.” *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 692 (2001) (Scalia, J., dissenting).

40. 42 U.S.C.A. § 12182(a) (West 2007).

41. *See Menkowitz*, 154 F.3d at 117.

42. *See id.* at 119-21.

43. *Id.* at 121.

44. *Id.*

45. *Id.*

46. 42 U.S.C.A. § 12182(b)(1)(A)(iv) (West 2007).

47. *Menkowitz*, 154 F.3d at 122-23.

48. *Id.* at 123.



ers or patrons.”<sup>49</sup> The district court also criticized the *Menkowitz* court for “inject[ing] Title III standards into . . . agency questions and thereby essentially re-writ[ing] the scope of Title I coverage.”<sup>50</sup> Looking to agency law to compare volunteers with employees, the *Bauer* court reasoned that because volunteers create potential tort liability for the organization, they cannot be patrons and therefore must be assessed as employees.<sup>51</sup>

The *Bauer* court went on to explain that even if Title III applied to the plaintiffs, it would not provide relief. According to the court, the “MDA has a compelling interest in selecting appropriate volunteers who can ensure the safety of the campers . . . .”<sup>52</sup> The court did not provide evidence to support this contention; instead it held that the compelling interest was “clear” because most of the campers “are minors and many . . . have disabilities.”<sup>53</sup>

The ADA does not have a “compelling interest” exemption.<sup>54</sup> When an individual poses a “direct threat to the health or safety of others,” Title III allows a place of public accommodation to deny an accommodation to that individual.<sup>55</sup> The district court did not once mention the direct threat standard.

On appeal, the Tenth Circuit explained it was “persuaded that . . . the criteria for volunteer counselors are not discriminatory,” and it therefore did not need to decide whether Title III of the ADA applies to adult volunteer counselors but “assume[d], ar-

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49. *Bauer v. Muscular Dystrophy Ass’n*, 268 F. Supp. 2d 1281, 1293 n.4 (D. Kan. 2003).

50. *Id.* No other decision has disagreed with the holding of the *Menkowitz* court on this issue, yet no court has directly addressed the issue.

51. *Id.* at 1293.

52. *Id.* In its analysis, the court also “borrow[s] from Title I” to explain that “[t]he evidence shows that being able to assist in lifting campers . . . is . . . an essential function of the position of Volunteer Counselor.” *Id.*

53. *Id.*

54. The “compelling interest” standard normally refers to the test for state action that has a disparate result for people with disabilities. Scholars have disagreed on whether people with disabilities are a “protected class” warranting review under a “compelling state interest” standard. See, e.g., Michael L. Perlin, “*Make Promises by the Hour*”: Sex, Drugs, the ADA, and Psychiatric Hospitalization, 46 DEPAUL L. REV. 947, 964 (1997) (arguing that the ADA calls for a “compelling state interest justification for discrimination”). But see Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 WILLAMETTE L. REV. 1, 59 n.245 (1997) (“The text of the [Religious Freedom Restoration Act] requires the Court to apply its ‘compelling interest’ test; the text of the ADA contains no similar directive.”).

55. 42 U.S.C.A. § 12182(b)(3) (West 2007) (“The term ‘direct threat’ means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”).

guendo, that it does.”<sup>56</sup> The court’s reasoning in its determination that the criteria were not discriminatory is inconsistent with both Title I and Title III.

In its apparent application of Title III, the court only looked to the standards of Title I. The court explained that because emergencies are reasonably foreseeable, the requirement of lifting and caring for a camper is an “essential function.”<sup>57</sup> An “essential function” is a necessary feature of a position that an employer is *not* required to modify for an employee with a disability under Title I.<sup>58</sup> The court also correctly explained that Title I does not require that the MDA shift these essential duties to other employees who are able to perform them.<sup>59</sup> The Tenth Circuit concluded its reasoning by stating, “we cannot conclude that Title III requires the MDA to simply continue its past practice of allowing Ms. Bauer and Ms. Stolz to perform the duties they are capable of performing . . . .”<sup>60</sup> Therefore, the court reasoned, “we cannot hold that MDA violated Title III of the ADA when it began enforcing its ‘lift and care for a camper’ rule, even though such enforcement denied Plaintiffs the opportunity to participate as volunteer counselors.”<sup>61</sup> In other words, the Tenth Circuit used Title I standards to conclude that the MDA did not violate Title III.

## II. DETAIL OF TITLE I AND TITLE III<sup>62</sup>

The MDA violated the congressional intent of both Title I and Title III of the ADA when it failed to accommodate volunteers. The Tenth Circuit’s decision, however, confounded Title I and Title III to find no liability on the part of the MDA. The drafters of the

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56. *Bauer v. Muscular Dystrophy Ass’n (Bauer II)*, 427 F.3d 1326, 1330 (10th Cir. 2005). This Comment, therefore, cannot expand on the Tenth Circuit’s reasoning as to whether Title III applies to volunteers.

57. *Id.* at 1332.

58. 42 U.S.C.A. § 12113 (“It may be a defense to a charge of discrimination . . . that an alleged . . . selection criteria . . . has been shown to be . . . consistent with business necessity . . . . The term ‘qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”).

59. *Bauer II*, 427 F.3d at 1333.

60. *Id.*

61. *Id.*

62. Title II, which also covers accommodations, will not be discussed in this Comment. Not only was Title II not at issue in *Bauer II*, but a court has already ruled that Title II does not cover the dismissal of a volunteer. *See Tawes v. Frankford Volunteer Fire Co.*, No. 03-842-KAJ, 2005 U.S. Dist. LEXIS 786, at \*19 (D. Del. Jan. 13, 2005). Instead, the Delaware District Court in *Tawes* ruled that Title II only “guard[s] against discrimination in providing that service.” *Id.*

ADA could not have intended to allow a court to reach a conclusion on liability by combining Title I and Title III, each of which protects people with disabilities in very different situations. Although this Comment argues that Title III should be used to cover volunteers because it would provide volunteers with more protection, the plaintiffs in *Bauer* could prevail under either Title I or Title III.

#### A. The Plaintiffs in *Bauer* Satisfied Title I

Title I, which prohibits discrimination of employees with disabilities,<sup>63</sup> should cover the plaintiffs in *Bauer*. The district court in *Bauer* claimed that it did not analyze the case under Title I but implied that the plaintiffs would at least be covered by Title I as employee-like agents.<sup>64</sup> To be protected by Title I, the person must be “otherwise qualified,”<sup>65</sup> which the ADA defines as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”<sup>66</sup>

In the 1979 case *Southeastern Community College v. Davis*,<sup>67</sup> the Supreme Court construed “otherwise qualified” individuals as those who can perform all of the functions of a program except those that are limited by their disability.<sup>68</sup> Eight years later, in *School Board of Nassau County v. Arline*, the Court noted that “‘an individualized inquiry’ is necessary.”<sup>69</sup> The Court required the fact finder to delve into the details of the plaintiff’s disability to avoid “prejudice, stereotypes, or unfounded fear” of the plaintiff’s disability.<sup>70</sup> The decision in *Arline* is important because it recognized that a person is not required to meet every requirement, but

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63. 42 U.S.C. § 12112 (1990).

64. *Bauer v. Muscular Dystrophy Ass’n (Bauer I)*, 268 F. Supp. 2d 1281, 1292 n.3 (D. Kan. 2003) (“Plaintiffs do not claim that the defendant violated Title I. Accordingly, the court expresses no opinion as to whether plaintiffs could state a claim for relief under that Title.”).

65. *Id.*

66. 42 U.S.C. § 12111(8). The predecessor to the ADA, Section 504 of the Rehabilitation Act, also referred to “otherwise qualified” individuals in the same context as the ADA. 29 U.S.C.A. § 794 (West 2007).

67. 442 U.S. 397 (1979).

68. *Id.* at 406.

69. 480 U.S. 273, 287 (1987) (discussing whether the plaintiff, a school teacher with tuberculosis, is otherwise qualified despite her disability).

70. *Id.* (requiring the fact finder look to medical examinations to determine whether the plaintiff was actually contagious or if her employer had an “unfounded fear” of transmission of the disease).

merely the “essential” requirements of a position.<sup>71</sup> The United States Court of Appeals for the Fifth Circuit further clarified the point when it explained that if the individual cannot meet the essential functions of a position because of her disability, a court should look at whether a reasonable accommodation would allow the individual to perform the essential functions.<sup>72</sup>

Title I has afforded employers wide deference to determine which job functions are “essential.”<sup>73</sup> The Fifth Circuit has concluded that these essential functions must “bear more than a marginal relationship to the job at issue.”<sup>74</sup> A district court in Alabama has explained that the employer has the right to determine which functions are essential to a job.<sup>75</sup> In fact, the Title I definition of a “qualified individual with a disability”<sup>76</sup> strongly defers to policies defined before the individual with a disability was hired. As one commentator has noted, however, it provides “no deference to job descriptions that are prepared after an applicant has accepted a position.”<sup>77</sup> The employer must also require that the employees actually perform the functions deemed essential.<sup>78</sup> In other words, if the elimination of such duty does not fundamentally alter the position, then the duty is not essential.<sup>79</sup>

The court in *Bauer* should not have found that the requirements to “lift and care for a camper” are essential to the job of an administrative volunteer. Rather, the court should have recognized that the plaintiffs were successful volunteer counselors who had never performed these lift and care functions but were nevertheless performing other essential functions. In fact, Ms. Bauer’s history as a

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71. RUTH COLKER & ADAM A. MILANI, *THE LAW OF DISABILITY DISCRIMINATION* 134 (5th ed. 2005).

72. *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993).

73. 42 U.S.C.A. §12111(8) (West 2007) (“[C]onsideration shall be given to the employer’s judgment as to what functions of a job are essential . . . .”); see generally COLKER & MILANI, *supra* note 71, at 134.

74. *Chandler*, 2 F.3d at 1393-94.

75. *Johnston v. Morrison, Inc.*, 849 F. Supp. 777, 778 (N.D. Ala. 1994); see also Eric Wade Richardson, Comment, *Who Is a Qualified Individual with a Disability Under the Americans with Disabilities Act?*, 64 U. CIN. L. REV. 189, 215 (1995).

76. “[If] an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.” 42 U.S.C.A. § 12111(8).

77. Richardson, *supra* note 75, at 217 n.30 (citing 42 U.S.C.A. § 12111(8)).

78. 29 C.F.R. pt. 1630, app. (West 2007) (“The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential.”).

79. *Id.*; see also Thomas Simmons, *The ADA Prima Facie Plaintiff: A Critical Overview of Eighth Circuit Case Law*, 47 DRAKE L. REV. 761, 801-02 (1999).

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personal attendant counselor directly contradicts the MDA's argument that the counselors needed to perform these "essential functions" for the campers' safety.

Further, the *Bauer* district court looked solely to the fact that the counselor's job description required that she lift and care for a camper.<sup>80</sup> While a court should provide strong deference to the job description that was in place before the employee started, it should not do so in a case where, as in this case, the employer did not enforce these descriptions until much later. Accordingly, the court should have determined that Camp Chihowa discriminated against the plaintiffs by denying them a position based on arbitrary criteria.

### B. The Plaintiffs in *Bauer* Satisfied Title III

As opposed to Title I, which prohibits the discrimination of employees with disabilities, Title III prohibits discrimination that denies an individual with a disability "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."<sup>81</sup> Title III cases often turn on whether a defendant fits the statutory definition of a place of public accommodation<sup>82</sup> and thus falls within the realm of the statute. This distinction is important because employers have wider deference in determining whether they can legally exclude a person with a disability.

Although the MDA camps are clearly public accommodations,<sup>83</sup> the *Bauer* district court objected to the classification of the plaintiffs as "patrons of the public accommodation."<sup>84</sup> In one of the leading cases on this issue, *PGA Tour, Inc. v. Martin*, the Supreme Court held that golfer Casey Martin was a patron of a public accommodation, the PGA Tour, even though Martin was pursuing golf professionally.<sup>85</sup> The *Bauer* court distinguished *Martin* from

80. *Bauer v. Muscular Dystrophy Ass'n (Bauer I)*, 268 F. Supp. 2d 1281, 1293-94 (D. Kan. 2003) ("[T]he position of Volunteer Counselor was created for the primary purpose of providing physical assistance and supervision to campers. This fact is borne out by the evidence, including the job description . . .").

81. 42 U.S.C.A. § 12182(a). Title III also prohibits the conferral of an accommodation different than that provided to other individuals. *Id.* § 12182(b)(1)(A)(iii).

82. *See, e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (holding that the PGA Tour is a public accommodation).

83. A place of education, a day-care center, and a health spa are typical examples of places of public accommodation as enumerated in the ADA. 42 U.S.C.A. § 12181(7)(J)-(L).

84. *Bauer I*, 268 F. Supp. 2d at 1291.

85. *Martin*, 532 U.S. at 662.

the facts in the case before it by explaining that golfers “play at their own pleasure . . . [and] are not bound by any obligations typically associated with employment,” unlike the MDA camp, which, the court stated, directed the plaintiffs on the tasks to perform just as it directs its employees.<sup>86</sup> The difference between the MDA’s directions to the plaintiffs and the PGA Tour’s directions to Martin is indistinguishable. Golfers are directed by the PGA Tour on the tasks they are to perform.<sup>87</sup> Golfers are required to start at the tee of the first hole, and proceed until reaching the green of the eighteenth hole. Golfers are given precise tee times by the PGA Tour, are required to show up for photo opportunities and cocktail parties, and are bound by a strict dress code.<sup>88</sup> The level of control exerted by the PGA Tour over Martin is no different than the control that the MDA had over its volunteers. In both instances, the plaintiffs are performing tasks for their own pleasure and are not bound by the typical obligations of employment.

The MDA camp should be liable for discrimination because it failed to make an accommodation for the plaintiffs. If the MDA camp is a public accommodation, then under Title III it can only refuse to provide an accommodation if it would “fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations.”<sup>89</sup> In *Martin*, the Court found that in order to determine that allowing Casey Martin to use a golf cart would “fundamentally alter” the tournament, this exception must impair the “peripheral tournament rule[’s] . . . purpose.”<sup>90</sup> The Court explained that the ADA requires the PGA Tour to provide Martin with a “chance to qualify for and compete in the athletic events,”<sup>91</sup> whereas the dissent disagreed and commented that the PGA Tour was simply required to grant access to the game.<sup>92</sup> The *Bauer* appellate court, on the other hand, recognized that Ms. Bauer and Ms. Stolz did not want to fundamentally alter, or for that matter, make any alterations to the way that they had worked for the camp in the past.<sup>93</sup> Nevertheless, the *Bauer* appellate court

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86. *Id.* at 680 n.33.

87. *See, e.g.*, Prof’l Golf Ass’n, The Rules of Golf, <http://www.pga.com/play/the-rules-of-golf.cfm> (last visited Apr. 17, 2007).

88. *See id.*

89. 42 U.S.C.A. § 12182(b)(2)(A)(ii) (West 2007).

90. *Martin*, 532 U.S. at 690.

91. *Id.*

92. *Id.* at 699 (Scalia, J., dissenting).

93. *Bauer v. Muscular Dystrophy Ass’n (Bauer II)*, 427 F.3d 1326, 1332 (10th Cir. 2005); *see also* *Bauer v. Muscular Dystrophy Ass’n (Bauer I)*, 268 F. Supp. 2d 1281,

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explained that Title III does not require the MDA to continue to compromise the “essential function” of the volunteer position.<sup>94</sup> Again, the court was referring to a provision from Title I while it was discussing Title III. The court instead should have considered an easy way to accommodate the plaintiffs and achieve the goal that the counselors be able to lift and care for a camper: assign the volunteers tasks that they can physically perform and never leave them alone with campers who may need assistance in an emergency.

The *Bauer* district court also failed to examine Camp Chihowa’s need for volunteers. Although the court heavily weighed the fact that the camp hires volunteers to care for the campers,<sup>95</sup> it also mentioned that the volunteers “form a strong bond with children at the camp.”<sup>96</sup> The plaintiffs wanted the opportunity to form strong bonds with the children; in other words, they wanted the same access to the camps that other volunteers without disabilities have. Like the PGA Tour, the camp should not deny volunteers full access to the campers by providing only special one-day “guest appearances,”<sup>97</sup> but instead should allow volunteers with disabilities the opportunity to participate and enjoy the benefits of total participation.<sup>98</sup>

The plaintiffs in *Bauer* did not pose “a direct threat to the health or safety of others,” a provision that would have allowed the defen-

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1294 (D. Kan. 2003) (“Plaintiffs have not identified any reasonable modifications to MDA’s policy that would allow them to perform this essential function.”).

94. *Bauer II*, 427 F.3d at 1333.

95. *Bauer I*, 268 F. Supp. 2d at 1294 (“[I]t would fundamentally alter the nature of the services provided at the camp if MDA were required to modify its eligibility criteria and to accept Volunteer Counselors who are unable to provide such assistance.”).

96. *Id.* at 1288.

What is MDA Summer Camp? In simple terms it is a place where kids with Muscular Dystrophy from the ages of 6 to 21 come for one week in every year to enjoy activities they might not have a chance to participate in any other time, and have a fun time. Yet, Summer Camp is much more than that, it is [a] place where lifelong friendships are made, a place where love and caring is genuine . . . .

Camp Chihowa Home Page, <http://www.ibelievedesign.com/chihowa/> (last visited Apr. 17, 2007).

97. See *supra* text accompanying note 92 (discussing Justice Scalia’s dissent in *Martin*).

98. See *supra* text accompanying note 91; see also 42 U.S.C.A. § 12182(a) (West 2007) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment . . . .”).

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dant to escape liability.<sup>99</sup> This exception is not meant to allow employers to ignore the interests of people with disabilities for every public safety concern.<sup>100</sup> Instead, an employer needs to balance the interests of the employee and the public, as the court did in *Anderson v. Little League Baseball, Inc.*<sup>101</sup> In that case, the defendant tried to argue that Anderson, a base coach who used a wheelchair, posed a direct threat to the children by being on the field.<sup>102</sup> In assessing the rationale of this argument, the court balanced the effect on the children of prohibiting the plaintiff from coaching with the risk to their safety, and ultimately found for the plaintiff.<sup>103</sup> In *Bauer*, however, the court failed to examine the benefit that such volunteers bring to the camp. The benefits of having a positive role model with muscular dystrophy acting as a volunteer and caregiver outweigh the irrational fear that the plaintiffs could not react properly in the event of an emergency. The court instead accepted the MDA's contention that its stringent criteria were necessary for the camp's proper operation. Using a scare tactic, the camp exaggerated the potential benefits of the policy: the camp contended that if every volunteer could assist in an emergency, parents and campers would feel more comfortable.<sup>104</sup> The court failed to consider the other safeguard the camp had been using for years before 2002—each camper had a volunteer assigned to her twenty-four hours a day.<sup>105</sup> Parents and campers likely feel just as comfortable knowing that a child will always have a volunteer by her side to assist in an emergency, as they would if the defendant's policy proposal was enacted.

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99. 42 U.S.C.A. § 12182(b)(3) (“The term ‘direct threat’ means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures or by the provision of auxiliary aids or services.”).

100. *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 345 (D. Ariz. 1992) (“The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability; it must be based on an individual assessment that conforms to the requirements of [28 C.F.R. § 36.208(c)].”).

101. *Id.*

102. *Id.* at 343 (“[The players] should not have the added concern of avoiding a collision with a wheel chair during their participation in the game.”).

103. *Id.* at 345 (“An individualized inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear.”). When determining if the plaintiff posed a direct threat, the court took into consideration the fact that the coach had served as a Little League coach for three years without an accident. *Id.*

104. *Bauer v. Muscular Dystrophy Ass'n (Bauer I)*, 268 F. Supp. 2d 1281, 1294 (D. Kan. 2003).

105. *Id.* at 1286.



The camp should also recruit volunteers who not only care deeply for children, but specifically for children with muscular dystrophy. As much as able-bodied counselors can form strong bonds with children affected by muscular dystrophy, the emergency benefits they bring cannot outweigh the positive role modeling provided by volunteers with muscular dystrophy, such as Ms. Stolz and Ms. Bauer.

### C. Volunteers versus Employees

Agency law protects volunteers by providing them with the same tort protections as an employee; even without an agreement, a volunteer may be a servant of the person accepting services<sup>106</sup> who would therefore be liable for any torts of the servant/volunteer.<sup>107</sup> Non-profit organizations do not compensate their volunteers, and therefore volunteers customarily receive non-monetary benefits from an organization in exchange for their time, such as the use of an organization's services, facilities, and accommodations. Thus, determining whether a volunteer should be treated as an employee or as a patron is simply a matter of perspective.

Federal law determines a person's status as an employee.<sup>108</sup> The United States Supreme Court defined employees, for the purposes of "social legislation," as persons economically dependent on the businesses for which they perform services.<sup>109</sup> The question of whether a person is a volunteer or employee is common in employment discrimination scenarios. In *Tawes v. Frankford Volunteer Fire Co.*, for example, the Delaware District Court looked to employment discrimination cases to determine that a volunteer firefighter is not an employee for the purposes of Title I of the

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106. RESTATEMENT (SECOND) OF AGENCY § 225 (West 2006) ("One who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services.").

107. *Id.* § 401 ("An agent is subject to liability for loss caused to the principal by any breach of duty.").

108. *See, e.g., Tawes v. Frankford Volunteer Fire Co.*, No. 03-842-KAJ, 2005 U.S. Dist. LEXIS 786, at \*10 (D. Del. Jan. 13, 2005) (using case law from the employment discrimination context to decide that a volunteer fire fighter is not an employee under Title I when the employer did not have the requisite fifteen employees); *see also Calderon v. Martin County*, 639 F.2d 271, 272-73 (5th Cir. 1981) (holding that the question of whether a Florida deputy sheriff is an "employee" within the meaning of Title VII is a question of federal law).

109. *United States v. W. M. Webb, Inc.*, 397 U.S. 179, 185 (1970).

ADA.<sup>110</sup> The court noted that compensation is required to find that a person is an employee.<sup>111</sup>

#### D. Title III Provides the Best Protection for Volunteers

Because of the nature of volunteering, volunteers most closely resemble patrons of public accommodations, who are protected under Title III. Volunteers offer their time because they enjoy volunteering and reap a personal benefit from their volunteer work. In return for their time, volunteers often receive the use of “goods, services, facilities, privileges, advantages or accommodations,” which are benefits that must be rendered equally to people with disabilities under Title III.<sup>112</sup> In fact, the *Bauer* court’s interpretation of *Martin* speaks strongest to Title III’s protection of volunteers: Title III protected Martin because golfers “play at their own pleasure . . . [and] are not bound by any obligations typically associated with employment.”<sup>113</sup>

### III. THE PUBLIC DUTY THESIS

*Bauer* is a troubling case. It exemplifies the fringe problems that occur with the ADA—many organizations, including the non-profit MDA, do not proactively accommodate people with disabilities even if personal ethos would impose this duty on people as citizens. All social legislation has the problem of the ADA; when requiring large groups of individuals to act according to a moral norm, many individuals will object even if their own personal ethos would have driven them to act in accordance with the legislation.<sup>114</sup> The ADA is a floor, and some states have enacted legislation that surpasses its requirements.<sup>115</sup> For reasons inapplicable to this Comment, however, some courts have limited the application of the ADA to the point where it has subverted the original purpose of achieving

110. *Tawes*, 2005 U.S. Dist. LEXIS 786, at \*12-13 (citing *Graves v. Women’s Prof’l Rodeo Ass’n*, 907 F.2d 71 (8th Cir. 1990)).

111. *Id.* at \*11 (citing *O’Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997)).

112. 42 U.S.C.A. § 12182 (West 2007).

113. *Bauer v. Muscular Dystrophy Ass’n (Bauer I)*, 268 F. Supp. 2d 1281, 1292 (D. Kan. 2003); *see also supra* text accompanying note 86.

114. This idea is not new. *See, e.g.*, LAO-TZU, TAO TE CHING 58 (Stephen Mitchell trans., Harper Perennial 1992) (1988) (“Try to make people moral, / and you lay the groundwork for vice.”). Lao-Tzu’s suggestion is that the leader “serve[s] as an example.” *Id.*

115. *See, e.g.*, CAL. GOV’T CODE § 12926.1(a) (West 2007) (“Although the federal act provides a floor of protection, this state’s law has always, even prior to passage of the federal act, afforded additional protections.”).

equality.<sup>116</sup> The public duty thesis is based on the opposite idea; it calls for all factions of society to change the way that people with disabilities are cared for and to proactively help accommodate them.<sup>117</sup>

Until recently, Western countries cared for people with disabilities according to the charity-based model, which is rooted in the idea that people with disabilities are different, disadvantaged, incapable, and in need of public assistance. Institutions had been the primary caregivers since the Middle Ages.<sup>118</sup> In Eastern countries, on the other hand, families and society at large care for people with disabilities.<sup>119</sup> Richard K. Scotch attributes the institutionalization of people with disabilities in the West to the destruction of the “family and community support systems.”<sup>120</sup> Starting with Section 504 of the Rehabilitation Act of 1973 (“Section 504”)<sup>121</sup> and eventually the ADA, disability policy in the United States shifted away from this charity-based model to a minority-group model, which recognized the patterns of discrimination against people with disabilities (often promulgated by the charity-based model) as the real problem.<sup>122</sup>

116. See *supra* text accompanying note 11.

117. See *supra* note 2 and accompanying text. George H. Bush’s quote that volunteers are “partners in civilization” helps to explain the great ability that people who voluntarily help others have to affect positive change to society.

118. People with disabilities, especially those with mental disabilities, were often institutionalized for life. See, e.g., Rosanne Burton Smith et al., *Does the Daily Choice Making of Adults with Intellectual Disability Meet the Normalisation Principle?*, 30 J. INTELL. & DEVELOPMENTAL DISABILITY 226, 227 (2005) (“In the past, the institutionalisation of individuals with intellectual disability severely restricted the possibilities for development of personal control and self-determination . . .”).

119. For a complete history of the care-giving institutions in the West, see RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* 15-24 (2d ed. 2001); see also R. Srinivasa Murthy, *Reaching the Unreached*, LANCET PERSP., Dec. 2000, at S39 (“At the time of independence in 1947, India—with a population of more than 340 million—had only 10,000 psychiatric hospital beds, in contrast to England, which had more than 100,000 such beds for a population a tenth of the size of India’s.”).

120. SCOTCH, *supra* note 119, at 15 (“In most cultures, disabled people have been supported within the context of the family and the community. In the West, however, as family and community support systems broke down, physically and mentally disabled persons were relegated to cultural institutions.”).

121. 29 U.S.C.A. § 794(a) (West 2007) (“No otherwise qualified individual with a disability in the United States, as defined in section 705(20) . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . .”).

122. SCOTCH, *supra* note 119, at 169 (defining the minority-group model as advocating that the “major barriers to social and economic participation facing people with disabilities were discriminatory attitudes, policies, and physical environments”); see generally Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability:*

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Professor Harlan Hahn has advocated that courts interpret Section 504 and the ADA using the minority-group model.<sup>123</sup> Without understanding this model, judges, lawyers, and legislators might apply a traditional charity-based model of alleviating disability discrimination by “correcting impairments to the maximum extent possible.”<sup>124</sup> Professor Hahn also notes that courts have been reluctant to apply the ADA as stringently as they apply civil rights legislation because people with disabilities have not traditionally faced the same bigotry as racial minorities.<sup>125</sup> He attributes the “sympathetic endorsements” and “patronizing attitudes” of politicians<sup>126</sup> to their uneasiness with the subject,<sup>127</sup> which in turn hinders the achievement of equal rights because it does not encourage candid dialogue.<sup>128</sup> Though his conclusion is controversial, his observation is not: “[T]he relative lack of widespread public discussion about the nature and meaning of disability reduces the opportunities for judges and policymakers to gain the knowledge necessary to make informed judgments about incidents of alleged discrimination.”<sup>129</sup>

Professor Hahn’s recognition of the way courts and legislators treat people with disabilities speaks to a much larger problem, which, if solved, could end the struggle that people with disabilities often need to overcome in order to receive proper accommodations. In fact, the definition of “accommodation” highlights the problem. An accommodation is “something supplied for convenience or to satisfy a need.”<sup>130</sup> In other words, someone must actively supply—and implicitly pay for—this accommodation.

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*The Minority-Group Perspective*, 14 BEHAV. SCI. & L. 41 (1996) [hereinafter Hahn, *The Minority-Group Perspective*]. The movement toward the minority-group model can also be seen in the wide-scale deinstitutionalization of people with disabilities that took place in the 1970s in the United States and the United Kingdom. See, e.g., J. Aa. Nottestad & O. M. Linaker, *Predictors for Attacks on People After Deinstitutionalization*, 46 J. INTELL. DISABILITY RES. 493, 494 (2002).

123. See Hahn, *The Minority-Group Perspective*, *supra* note 122, at 41; see also Harlan Hahn, *Towards a Politics of Disability: Definitions, Disciplines, and Policies*, SOC. SCI. J., Oct. 1985, available at <http://www.independentliving.org/docs4/hahn2.html>. R

124. Hahn, *The Minority-Group Perspective*, *supra* note 122, at 41. He is not referring to physically correcting impairments, but instead forcing people with disabilities into the mold that society has created for people without disabilities. R

125. *Id.* at 42.

126. *Id.*

127. *Id.* at 43.

128. *Id.* at 42.

129. *Id.*

130. MERRIAM-WEBSTER ONLINE, <http://www.m-w.com/cgi-bin/dictionary?va=accommodation> (last visited Apr. 17, 2007).

Practically, the ADA must dictate who must provide the accommodations to those subject to the ADA's requirements, such as employers and owners of places of public accommodation, in order to attach liability and give the ADA any legislative weight. Yet the ADA drafters wanted to eliminate *daily* discrimination of people with disabilities,<sup>131</sup> not just discrimination faced in the workplace or in places of public accommodation. The ADA seems to be aiming for a disability rights activists' dream: the duty to "accommodate" a person with a disability falls not only to employers, but to all segments of society. I have termed this duty the "public duty thesis."<sup>132</sup>

The public duty thesis is not new, nor is there an easy way to achieve its goal. As *Bauer* illustrated, interpretation of the ADA can lead to gross abnormalities. Widespread education of the minority-group model and the destruction of ideals fostered by the charity-based model would help spur the drafting and interpretation of legislation. Courts would in turn recognize the ADA drafter's intent to alleviate discrimination, not just the ADA's current limited applications of its anti-discrimination thrust. If applied by the courts, the public duty thesis could operate as a supplement to the ADA, and not simply a justification for it.<sup>133</sup> The public duty thesis should cover the areas that legislation cannot cover. It requires not only an acknowledgment that the minority-group model is the way to approach legislation, but also advocates for individuals to be proactive within their own communities.

This Comment advocates for a society in which accommodating a person with a disability is not a legal obligation, but is instead a courtesy for the realization that we all require a means to access.

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131. 42 U.S.C.A. § 12101(b)(4) (West 2007) ("It is the purpose of this chapter . . . to address the major areas of discrimination faced day-to-day by people with disabilities.").

132. The public duty thesis developed from interactions with a close childhood friend who has cerebral palsy and walks with crutches. She often had friends help her with basic tasks in school, such as carrying her books. Instead of "helping" her in a way that disabled her, her teachers and peers related to her in a way that actually *enabled* her. These small and seemingly insignificant acts would be powerful and indeed quite significant if reproduced on a wide scale.

133. One of the biggest fears in any disability rights case or legislation is the cost of accommodation. The public duty thesis would not cause any further expense than the ADA, which studies have shown costs less than many expect. U.S. Dep't of Justice, *Myths and Facts about the Americans with Disabilities Act*, <http://www.usdoj.gov/crt/ada/pubs/mythfct.txt> (last visited Apr. 17, 2007) ("A recent study commissioned by Sears indicates that of the 436 reasonable accommodations provided by the company between 1978 and 1992, 69% cost nothing, 28% cost less than \$1,000, and only 3% cost more than \$1,000.").

Because humans cannot fly, architects and engineers have created various ways for people to access the second floor of a building. If stairs are required in every two-story house occupied by humans, why not a ramp for a place where a person with a physical disability would likely need access? When a student in middle school breaks her leg, her friend will help her carry her books. When a pregnant woman cannot find a seat on the bus, common courtesy calls for a person to give up the seat for her. When a person with a disability cannot alone lift and care for a camper in the event of an emergency, the other counselors should ensure that the person with a disability is not left alone with that camper. None of these duties belong to any person as an employer or as a supplier of a public accommodation, but these duties belong to human beings who are simultaneously able to make rational decisions to avoid risk and help each other.

Emergency planning seems to be one of the trump cards that employers play to relieve themselves of compliance with the ADA.<sup>134</sup> Emergencies, however, cannot be legislated away. Legislators, directors, campers, parents, and volunteers cannot know how every different situation will play out; there is inherent risk in every activity. In emergency planning for camps and other places of accommodation, the director typically assigns each person a role that fits her needs and abilities. The public duty thesis calls for emergency planners to find a way to help people with disabilities by placing them closer to emergency exits. In a summer camp, this could be achieved by allowing able-bodied counselors to evacuate the campers, but not avoid the presence of counselors with disabilities altogether.

Although the district and appellate courts' analyses in *Bauer* are troubling, the actions of the MDA are alarming. Perhaps because the MDA cares for people with disabilities, it should adhere to at least the same standard, if not a higher standard, than a for-profit company. The camp discriminated against the same people it has secured private funding to help. If the MDA cannot treat people with disabilities equally, who can?

Courts should also consider whether the drafters intended the ADA to allow age to be a determining factor in the need for public accommodation. If MDA camps provide facilities to people under the age of twenty-one,<sup>135</sup> and a volunteer with muscular dystrophy needs the same services as campers with muscular dystrophy,

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134. See *supra* notes 100-103 and accompanying text.

135. MDA, National Events and Programs Volunteer Opportunities, *supra* note 3.

should the ADA allow the MDA to refuse to supply those services, as a place of public accommodation, to people with disabilities over the age of twenty-one?

Congress should enforce the duty to accommodate people with disabilities on non-profit organizations receiving federal funds for the care of people with disabilities, as set out in the Rehabilitation Act.<sup>136</sup> The federal government often controls actions of states and organizations by withholding funds; perhaps the government should require disability rights organizations that receive federal funds to go beyond the ADA and tailor job descriptions to people with disabilities.<sup>137</sup>

#### IV. CONCLUSION AND SOME PRACTICAL SOLUTIONS

The public duty thesis obviously has inherent limitations. Changing the way people think about individuals with disabilities can only be achieved through widespread education, which is a difficult task. Changing the way people think, however, was the goal of the ADA. This goal, although lofty, should not be abandoned.

Legislating safely is close to impossible. The legislation in reaction to the September 11th attacks shows that the government cannot easily force its citizens into accepting what it deems a public duty.<sup>138</sup> Citizens have to be proactive and take individual responsibility to go beyond legislation in order to help others and to move this country forward. Ronald Reagan, in his assertion that “government . . . can never take the place of volunteers”<sup>139</sup> recognized that volunteers have a greater ability to effect change than does the government.

Groups like the MDA, United Spinal, and other disability rights organizations are trying to educate the public about the issues facing people with disabilities. Each of these organizations has achieved commendable results. For example, United Spinal is largely responsible for the New York City transit system’s adaptation of all buses for wheelchair accessibility.<sup>140</sup> Although this ac-

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136. *See supra* note 121.

137. Ideally, federal, state, and local governments, too, would be major employers of people with disabilities.

138. *See, e.g.*, 18 U.S.C.A. § 2516 (West 2007) (amending the Federal Wiretap Statute); Lorrie Thomas Lee, *The USA Patriot Act and Telecommunications: Privacy Under Attack*, 29 RUTGERS COMPUTER & TECH. L.J. 371, 371 (2003) (critiquing the USA PATRIOT Act and discussing the related privacy concerns).

139. *See supra* note 1 and accompanying text.

140. United Spinal Ass’n, Accessible Transportation Background, <http://www.unitedspinal.org/advocacy/taxisforall/united-spinal%E2%80%99s-accessible-trans->

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complishment has a negligible impact on the able-bodied New Yorker, its accomplishment for people with disabilities cannot be overstated, as it is a step towards integration. And, the integration of people with disabilities into an able-bodied community can positively affect the way that an employer or storeowner perceives people who use wheelchairs. This is an amazing example of a change that hopefully creates volunteers out of those employers and storeowners who see people in wheelchairs on their morning bus ride.

Admittedly, social changes can be slow to take hold. Small changes to laws or the way in which those laws are enforced, however, can have a great effect on the way that people with disabilities are treated. For example, courts can easily promote a public duty thesis by questioning the rationale an employer used in determining what an essential duty is for a particular position. It is difficult for an outsider to determine the essential functions of a given position. Practically, the employer knows the essential functions of a given job the best, and logically would hire those people who can best perform those tasks. If courts imposed a higher standard on these employers, employers could avoid litigation by slightly modifying the essential functions of a position if the essential function is not adequately clear. Likewise, Congress could amend the ADA so that non-profit organizations are required to tailor job descriptions to fit volunteers with disabilities. For example, Ms. Bauer and Ms. Stolz could be volunteer editors of the newspaper and the yearbook so long as they can perform such functions required of newspaper editors, not of personal attendant counselors.

Volunteers need to be accommodated, whether under Title I or Title III. The fact that volunteers do not fit nicely into the categories described in Title I or Title III does not excuse any organization from not accepting people with disabilities as volunteers. The ADA clearly intended to protect people with disabilities from this institutionalized discrimination, whether as employees or independent contractors, customers or volunteers. In order for this society-changing legislation to be fully effective, however, legislators and especially courts need to change the way they think about people with disabilities who, unfortunately, remain an under-utilized resource.

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portation-background/ (last visited Apr. 17, 2007). New York City still has not made the subway system fully accessible. For up to date information on New York City's accessibility for people with disabilities, see the Disabled Riders Coalition, Home Page, <http://disabledriders.org/> (last visited Mar. 3, 2007).